

RENDERED: AUGUST 20, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002193-MR

JOHN PAUL MCGRAW

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 05-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: John Paul McGraw appeals from an order of the Grant Circuit Court denying his motion for post-conviction relief. For the reasons stated herein, we affirm.

On July 13, 2005, McGraw was indicted by a Grant County grand jury for second-degree burglary and for being a first-degree persistent felony offender

(PFO-I). Subsequently, McGraw entered a plea agreement to the two offenses charged in the indictment. He received a ten-year sentence for burglary, which was enhanced to a mandatory sentence by virtue of his PFO-I conviction. His two prior five-year sentences were ordered to run consecutively to each other and to his ten-year sentence for an effective sentence of twenty-years' imprisonment.

On October 14, 2008, he filed a post-conviction motion pursuant to CR¹ 60.02, alleging that his PFO-I conviction was improper because there was no basis for the charge. He argued that his two prior convictions should be considered one prior conviction because he never served prison time for either conviction. Thus, he argued that he could have only been convicted of a PFO-II. Without granting a hearing, the trial court denied McGraw's motion. This appeal followed.

McGraw contends that the trial court erred by permitting the use of two concurrent probated sentences as two separate convictions for PFO purposes. Because he claims that this was statutorily impermissible, he contends that the trial court was required to vacate his PFO-I conviction. The Commonwealth contends that McGraw's motion was properly denied because it was procedurally barred pursuant to *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

“Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or RCr 11.42 proceedings.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Rather, CR 60.02 permits a judgment's modification

¹ Kentucky Rules of Civil Procedure (CR).

based on matters, not shown on the face of the record and not available by appeal, which were not known until after the rendition of judgment without fault of the party seeking relief. *Barnett v. Commonwealth*, 979 S.W.2d 98, 101 (Ky. 1998).

Moreover, CR 60.02 requires that a party make a substantial showing before he may be entitled to extraordinary relief under its provisions. *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970). We review the denial of a CR 60.02 motion under the abuse-of-discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). Our test for abuse of discretion is to determine if the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In this case, McGraw could and should have challenged his PFO-I conviction during his trial proceedings and then, if necessary, on direct appeal. A defendant cannot use a CR 60.02 motion as “a substitute for, nor a separate avenue of, appeal.” *Mauldin v. Bearden*, 293 S.W.3d 392, 397 (Ky. 2009). Kentucky's structure for attacking a final judgment is not haphazard and “is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02.” *Gross*, 648 S.W.2d at 856. Here, McGraw did not follow these procedural steps.

In any event, his contention that his two prior convictions resulting in probation must be deemed to be one conviction for PFO purposes is meritless. While he contends that actual imprisonment is required between convictions before a PFO-I conviction can be supported based on prior convictions, our courts have held that “convictions which [result] in probation, parole, etc., should be included

in prior convictions...,” and that the requirement of actual imprisonment is no longer necessary. *Commonwealth v. Hinton*, 678 S.W.2d 388, 390 (Ky. 1984).

Furthermore, the conviction and disposition sequencing in McGraw’s case is directly analogous to the facts in *Thacker v. Commonwealth*, 194 S.W.3d 287 (Ky. 2006). In *Thacker*, a defendant was convicted and received probation for two separate, sequential convictions. *Id.* at 292. Although he reoffended, his probation for his first conviction was not revoked following his second conviction. *Id.* Despite his service of uninterrupted consecutive sentences, the two prior convictions were permitted to support his PFO-I conviction. *Id.* at 292-93. Accordingly, we conclude that the trial court’s denial of his CR 60.02 motion was not erroneous.

McGraw next contends that the trial court erred by refusing to grant him an evidentiary hearing on his CR 60.02 motion. However, a party is not entitled to an evidentiary hearing unless he alleges facts which, if true, “justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Gross*, 648 S.W.2d at 856. Because McGraw has not met this standard, we conclude that the trial court did not err by denying him a hearing.

For the foregoing reasons, the order of the Grant Circuit Court is affirmed.

ALL CONCUR.

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